No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE

BENJAMIN L. BROWN,
City Solicitor,
*AMBROSE T. HARTMAN,
Deputy City Solicitor,
L. WILLIAM GAWLIK,
Assistant City Solicitor,
City Hall,
Baltimore, Maryland 21202,
(301) 396-3298,
Attorneys for Mayor and City Council of Baltimore, Respondents.

April, 1985

* *Counsel of Record*

The Daily Record Co., Baltimore, MD 21202

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do the provisions of Baltimore's retirement ordinance pertaining to mandatory retirement of firefighters satisfy a reasonable federal standard under this Court's ruling in *EEOC v. Wyoming*?

2. Where a municipality, pursuant to its obligation to protect the safety of its citizens, imposes an age 55 BFOQ on its firefighters, what standards govern the review of that BFOQ by a trial court evaluating an ADEA Section 4(f)(1) defense?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

PAGE

Constitution, Statutes and Regulations

Miscellaneous

No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE

STATEMENT

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., specifically allows an employer to retire occupational qualification "reasonably necessary to the normal operation of the particular business, or where the differentiation is based upon reasonable factors other than age." Section 4(f)(1), 29 U.S.C. 623 (f)(1).

The District Court found that on the record, respondents "have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis." 515 F. Supp. at 1295.

The Fourth Circuit reversed, finding that Baltimore's mandatory retirement policies satisfied the reasonable federal standard required by the bona fide occupational qualification exception to the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

Prior to the Age Discrimination in Employment Act of 1967 ("ADEA"), employers were free to apply any conceivable policy of mandatory retirement to their employees. Congress found that, insofar as mandatory retirement policies were irrational, the Nation was deprived of the benefits of the labor of older Americans without justification.

The legislative history of the ADEA shows beyond doubt that the legitimate interests of employers were to be protected by the bona fide occupational qualification exception ("BFOQ") set forth in Section 4(f)(1). Various legitimate concerns of the employer were recognized by Congress, including the concern that application of the Act should not imperil the public.

Furthermore, the legislative underpinnings of the Act reveal that Congress perceived age discrimination in a way fundamentally different from forms of discrimination based upon immutable characteristics. Age may often serve as a legitimate basis for distinction, but gender and race will almost never be considered a permissible basis for making distinctions in employment practices. Accordingly, the scope of the Act will necessarily determine the way in which exceptions to it are interpreted. As the type of discrimination becomes less justified, the exceptions will be more narrowly construed. Conversely, where the type of discrimination consists of arbitrary or irrational assumptions, the exception will not be applied as strictly.

To the extent that the BFOQ is determined to require a factual basis for its actions, Baltimore supplied a sufficient factual predicate for its mandatory retirement policies, a point not emphasized by the Circuit Court, and totally

ignored by the District Court. Baltimore's retirement policies were based upon identical policy consideration to those found by Congress to require a mandatory retirement statute for the Nation's firefighters. The development of Baltimore's retirement ordinance parallels that of the Federal statute. Any contention that Congress did not intend that its firefighters be subject to the reasonable general rule of mandatory retirement under 5 U.S.C. 8335(b) is simply contrary to the legislative history and the enormous body of evidence produced by the Federal agencies concerned.

Baltimore rejects the EEOC's suggestion that Congress acted arbitrarily in establishing mandatory retirement for Federal firefighters and law enforcement officers. Baltimore also rejects the contention that Congress established one set of principles for judging Federal retirement policies, and another, nearly impossible, set for local governments employing people to do jobs identical to those subject to Federal policies. Baltimore asserts that 1) Congress does not have the ability to establish heightened levels of judicial scrutiny to be applied to non-Federal employment, while permitting Federal employees identically situated to receive different treatment, and 2) if Congress has that authority, there is no legislative history indicating that Congress used it here.

The practical effect of applying the test formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which upheld a BFOQ for intercity bus drivers, deprives a local government of the ability it needs to regulate the retirement of its public safety employees. In this case, application of the District Court's opinion will require Baltimore to subject its firefighters to experimentation, or totally abandon any kind of retirement policy. Irrespective of how the BFOQ is applied, Baltimore justified its mandatory retirement practices to the extent required by the Act.

ARGUMENT

THE MANDATORY RETIREMENT AGE WHICH THE MAYOR AND CITY COUNCIL OF BALTIMORE ESTABLISHED FOR ITS PUBLIC SAFETY EMPLOYEES IS BASED UPON A BONA FIDE OCCUPATIONAL QUALIFICATION.

It is fundamentally wrong to apply the Age Discrimination in Employment Act to the citizens of Baltimore in a way which is certain to cause unnecessary death and illness. The law was never intended to be applied with this result, and it has only been because of the tortured application of the bona fide occupational qualification "exception" ("BFOQ"), Section 4(f)(1), 29 U.S.C. 623 (f)(1), that Baltimore faces a potential obligation literally to experiment with the lives of its firefighters, and endanger the safety of its citizens.

The Mayor and City Council of Baltimore has been a leader among the States and other political subdivisions of the Nation in developing progressive and humane retirement policies for its employees. In fact, Baltimore eliminated arbitrary judgments about its employees in 1926, more than a half-century before the Federal government did likewise.

Based upon its legislative judgment and experience, as well as evidence produced by the protective service occupations, Baltimore determined that in the interest of public safety, employees in those occupations should be mandatorily retired. This determination was not a blind and unthinking whim, but a humane and necessary response to the problems which we experienced in protecting and serving the citizens of Baltimore.

I. The Parallel Federal Provision Constitutes A Bona Fide Occupational Qualification for Firefighters.

A. *The Legislative History of the ADEA and the Bona Fide Occupational Qualification.*

Throughout the legislative history of the Age Discrimination in Employment Act ("ADEA"), Pub. L. 90-202, 81 Stat. 602, codified as 29 U.S.C. Sections 621-4, Congress was careful to preserve the legitimate interests of employers to structure a safe and efficient workforce.

The ADEA had its roots in the Equal Employment Opportunity Act of 1962 (H.R. 10144), introduced in the 87th Congress. House Report No. 1370 (February 21, 1962) (Equal Employment Opportunity Commission, *The Legislative History of the Age Discrimination in Employment Act* (1982) pp. 1-2) ("Leg. His. ADEA") Some elements of that bill provided the basis for provisions included in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. *Ibid.;* Leg. His. ADEA, p. 1, n.1. Even in that seminal bill, the House Labor Committee was careful to state that:

> [S]uch discrimination [because of age] will be prohibited only when the reasonable demands of the position do not require such an age distinction. . . .

Ibid.; Leg. His. ADEA, p. 2. The age distinctions which Congress sought to abolish were those unsubstantiated assumptions which deprived the Nation's commerce of the benefits of the older worker's labor. However, the exceptions to the Act, including the bona fide occupational qualification, were so patently obvious that they have commanded little attention from Congress. It was so evident that youth was a crucial requirement of a small core of occupations that the BFOQ provision was accepted with scant debate; not because the BFOQ provision was of minor importance, but because its justification was so clear. In connection with the amendment to include age within the provisions of Title VII, Senator Humphrey stated:

> All Senators know that age is often a factor in employment. I am sure neither the Senator from

> Louisiana nor any other Senator would want to have job factors established so that age would not be important, for example, in a person working on a superstructure on the 86th floor of a skyscraper. Everybody knows age is important in selective types of employment where there are dangerous pursuits and occupations.

110 Cong. Rec. 13491 (June 11, 1964); Leg. His. ADEA, p. 13.; Department of Labor, *The Bona Fide Occupational Qualification and Reasonable Factors Other Than Age Exception to Federal Age Discrimination in Employment Act of 1967: The Rule Proved, (Unpublished),* p. 7) (Page references are to Second Draft) ("DOL Report").

While the attempt to include age within the provisions of Title VII was defeated, the Secretary of Labor was directed to prepare a Special Study of the "factors which might tend to result in discrimination in employment because of age" and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age. . . ." Pub. L. 88-352, Section 715; Leg. His. ADEA, p. 15.

Secretary of Labor Wirtz responded with a thoughtful and incisive statement of the problem of age discrimination:

> The Congressional directive was carefully and precisely worded, avoiding prejudgment of the influence of discrimination on the employment of older workers, recognizing subtly that not all discrimination in this area is "arbitrary," asking a broad consideration of all "factors which might tend to result in discrimination" in employment because of age. . . .
>
> The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of a national policy opposed to discrimination based on race,

> color, religion, sex, or national origin. But there is an essential difference.
>
> The Nation has faced the fact — rejecting inherited prejudice or contrary conviction — that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy — and wrong.*

Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964: The Older American and Age Discrimination in Employment (1965) p. 1; Leg. His. ADEA, p. 19, emphasis supplied.

To the misfortune of the cities and states of this Nation, the U.S. Equal Employment Opportunity Commission ("EEOC") has had considerable success in seducing courts into following this "easy and wrong" approach to defeat the legitimate concerns of subdivisions providing fire and police protection to their citizens. Congress clearly and repeatedly stated that its aim was to eliminate an employer's ability to base its practices upon mere whim or speculation; but it was careful not to interfere with employment decisions which were reasonably related to important public objectives. According to the Secretary of Labor's report:

> The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions. It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."
>
> A third type of discrimination — which should perhaps be called something else entirely — involves decisions not to employ a person for a

> particular job because of his age when there is in fact a relationship between his age and his ability to perform the job. The only reason for marking out this third area is that it clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

Ibid., p. 2; Leg. His. ADEA, p. 20.

There are important and well-defined differences between discrimination in employment because of age, and invidious discrimination which Congress combatted elsewhere. There comes a time when distinctions based on age are justifiable, because at some point age is inherently related to ability. Moreover, when employment discrimination on account of age exists, it results from conjecture, not hostility towards individuals over the age of 40. 90 Harv. L. R. 380 (1976), p. 383 n.19. It seems anachronistic today, but at the time when the ADEA was being debated, it was the industry norm for airlines to retire "stewardesses" mandatorily at 32 years of age. Private employers were free to retire mandatorily an employee, or otherwise discriminate against him or her on the basis of age, for good reasons, bad reasons, or no reasons at all.[1] Accordingly, Congress fashioned the legislative cure to remedy the perceived ill:

> Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.
>
> The process of aging is inescapable, affecting everyone who lives long enough. . . . The element

[1] The arbitrary nature of this particular practice was made plain when Congress noted that a flight attendant forced out of the passenger cabin because of mandatory retirement at age 32 could legally fly the plane for 28 more years.

> of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers. . . .
>
> We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.
>
> * * * * * *
>
> There are unquestionably some jobs involving physical demands so unusual that it represents not only good business sense but common decency not to assign them to workers whose age increases the possibility of some weakening of body tissue.

Ibid., p. 8; Leg. His. ADEA p. 25.

In summarizing the basis for the bona fide occupational qualification the Secretary of Labor wrote:

> [The Act] does not prohibit or apply in any way to differentiations or distinctions made on the basis of age as far as there is legitimate relevance between age and employment capacity. The "discrimination" it is directed against is "unjust" or "arbitrary" distinction (which is what "discrimination" is normally taken to mean) which may be made in the *absence of any legitimate relevance between age and employment capacity.*

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Comittee on Labor and Public Welfare, 90th Cong., 1st. Sess. (1967) ("Senate 1967 Hearings"), p. 37 (Statement of Secretary of Labor Willard Wirtz); (DOL Report at p. 14.) Secretary Wirtz specifically noted that his interpretation

of the prohibition of "discrimination" in the bills before Congress meant *"arbitrary* age discrimination," and that this view was reflected in the exceptions to the bills' prohibitions, including the BFOQ. DOL Report, n.62, quoting Senate 1967 Hearings. (Emphasis in DOL Report.)

Senator Javits stated that his proposal was:

> [A]n effort to do something about discrimination in employment because of age. . . . [I]t has the basic bona fide occupational qualification provision which takes care of any problems which could arise in connection with it.
>
> [T]he provision exempts an age distinction from any part of the prohibition with respect to discrimination when such an age distinction is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."
>
> Mr. President, *these are words of art to take care of any valid employment problem because of age.* We are not trying to require the hiring of 65-year-old ladies — distinguished as they may be — to be airline stewardesses, or to fit men and women who are square pegs into round holes, or anything of that kind.

112 Cong. Rec. 20820 (1966) (Remarks of Senator Javits); Leg. His. ADEA, p. 51; DOL Report at p. 13 (Emphasis supplied). Almost all of the members of Congress, the witnesses appearing before the subcommittees of the House of Representatives and the Senate holding hearings, and those submitting written material agreed either explicitly or implicitly that a BFOQ should be included in any legislation attempting to deal with age discrimination in employment. (DOL Report at p. 13, n.60.) The record of the Congressional hearings on the bills which were to become the ADEA contain repeated references to the BFOQ exception but few substantive discussions of the meaning of the exception. (DOL Report at p. 13.)

Much of the difficulty for cities and towns providing emergency services arose when Congress selected words of art which had previously been used in connection with other forms of discrimination. The judicial interpretation of the BFOQ exception to Title VII is predicated upon the evil which Congress sought to eradicate. The legislative history should leave little doubt that Congress did not intend that tests appropriate for Title VII discrimination be applied to age discrimination. Baltimore argued below that the BFOQ test applied by the District Court is incorrect, and that this Court should enforce the ADEA as it was intended by Congress to be enforced.

Congress incorporated in the Act exceptions which would have been utterly unthinkable in connection with the eradication of other kinds of discrimination. For example, in addition to exceptions for the BFOQ and reasonable factors other than age, the ADEA as enacted contained exclusions for bona fide executives or policy makers and certain tenured employees of higher education institutions. Sections 12(c)(1), (d). Even the maintainance of a balanced work-force was considered a legitimate employer concern, to be protected by exceptions to the Act. Leg. His. ADEA p. 80.

The history of the Act, as it passed through the legislative process, proves beyond doubt that Congress intended the BFOQ provision to take "into full consideration the problems and interests of employers." Leg. His. ADEA p. 157. In other words:

> The bill recognizes fully the legitimacy of employment decisions, practices, and arrangements which take account of the facts — where they are facts — of the relationship between age and capacity.

Leg. His. ADEA p. 158.

The Fourth Circuit's conclusion, following *E.E.O.C. v. Wyoming,* 460 U.S. 226 (1983), that Baltimore's policies

are to be judged against a reasonable federal standard is well-founded. That employment practices must be a reasonable reflection of the hazards and exigencies in the employment pervades the legislative history of the Act. When the employer's practices are not arbitrary, the Act does not prohibit an employer from establishing a reasonable general rule.

B. *The Requirement that a Bona Fide Occupational Qualification Be Supported by A Reasonable Basis in Fact.*

Petitioners cite a section of the legislative history of the ADEA which they claim supports a "case-by-case" analysis, meaning a "lawsuit-by-lawsuit" determination of whether an employer's mandatory retirement practices are justified by a BFOQ (Johnson Br. 10). We set out the paragraphs immediately preceding that section to show that Congress did not intend a "lawsuit-by-lawsuit" determination of BFOQ's in areas where the employer's practices were created in response to extraordinary problems:

> The Committee recognizes . . . that bona fide age requirements do exist for some positions designed to give employees knowledge and experience which can reasonably be expected to aid in developing capabilities for future advancement to executive, administrative, or professional positions, and expects the Secretary to appropriately recognize such requirements.
>
> * * * * * *
>
> In the trucking industry, regulatory agencies, for the safety and convenience of the public, have imposed requirements as to the physical qualification of the drivers. It is, of course, not the purpose of this legislation to require the employment, regardless of age, of one not otherwise qualified in such instances. The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of employment occur for the strict application of general prohibitions and provisions.
>
> It is enough that the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad guidelines for its implementation.

H.R. Rep. No. 805, 90th Cong., 1st Sess. (October 23, 1967), p. 7; Leg. His. ADEA p. 80. The "case-by-case" analysis referred to in the legislative history was clearly an "employment-by employment" analysis to be conducted by the Secretary of Labor in order to assist employers in complying with the Act. The language warns against the "strict application of general prohibitions and provisions" *of the ADEA*, not its exceptions.

Once again, the legislative history clearly demonstrates that Congress intended to allow employers to make reasonable generalizations about age. Secretary Wirtz stated that the ADEA would permit "administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age, and those where there is not that justification." Senate 1967 Hearings, at p. 37 (Statement of Secretary Wirtz); (DOL Report at p. 14.) In fact, Congress assumed that the Department of Labor would join in partnership with employers to establish BFOQ's and other exemptions based upon reasonable factors other than age. There was nothing in the transfer to the EEOC of enforcement of the ADEA which lessened the anticipation of or justification for this partnership. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

Rather than assisting employers in finding a reasonable balance between the rights of older employees and a political subdivision's profound obligation to provide police and fire protection for its citizens, the EEOC chose to be

part of the problem. It refused to issue reasonable guidelines, and maintained that any distinction based upon age was prohibited by the Act, despite the absence of one iota of legislative intent supporting that position. Instead, it noted,

> The state and local agencies have only recently been predicating their defense of age limits on the issue of public safety. It appears that they have yet to develop sophisticated statistical defenses that will be necessary to support the age BFOQ's in the protective occupations.

(J.A. 13).

This is a total repudiation of the responsibility which Congress placed first upon the Department of Labor and later transferred to the EEOC. The charge was not to find ways to circumvent the BFOQ defense — not to find legal niceties to deny relief to an employer who legitimately deserved a BFOQ for its employees, but to work with the employer to ensure that its legitimate concerns were protected.

The principal justification for the EEOC's position is that "statistics seem to be available" to support its hypotheses. (J.A. 18; Johnson Br. 36). It is irresponsible and well beyond any legitimate argument based upon legislative history to upset public retirement plans simply because "statistics seem to be available." To serve its own ends, not those sought by Congress, the EEOC has sued nearly one hundred States, counties and municipalities across the Nation for observing employment practices similar or identical to those created by Congress itself. In the State of Indiana alone, the EEOC has filed charges of age discrimination in the law enforcement occupations against more than 60 towns, counties and municipalities in the State. Because the Department of Labor, and the EEOC after it, refused to establish reasonable standards for employers to consider in determining whether their

actions were proper under the Act, the Fourth Circuit was well justified in filling that void by resort to the parallel federal statute.

The meager interpretation provided at 29 C.F.R. 860.102(d)[2] states that federal statutory and regulatory requirements which require retirement without reference to the individual's actual physical condition when imposed for the safety and the convenience of the public are examples of possible BFOQ's. Petitioners state that the BFOQ[3] provision does not even apply to federal employees, as regulation of their rights is only subject to rational scrutiny — why then did the Department of Labor specifically mention Federal statutory requirements unless it recognized the validity of using a statute such as 5 U.S.C. Section 8335(b) as a BFOQ?

While an employer is not permitted to make age distinctions on speculation, nor should it be required to base its employment practices upon it. As the EEOC observes, even its highly partisan statistics only "appear to indicate" that there is a case against mandatory retirement for public safety personnel. Given that proof of the BFOQ is a burden placed upon the employer, if after

---

[2] The Interpretative Bulletin issued for the ADEA by the Wage and Labor Standards Division of the Department of Labor provides examples of possible BFOQ's:

> "(d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public."

29 C.F.R. Section 860.102.

[3] The federal BFOQ was couched in terms nearly identical to the one applicable to other employers:

> "The current provision in section 15 (b) which allows the Civil Service Commission to establish maximum age requirements when such as is a bona fide occupational qualification necessary to the performance of [the] job."

(Leg. His. ADEA, p. 371).

the battle of the experts, the EEOC's statistics appear to indicate that a BFOQ is not warranted, and the employer's statistics appear that it is, under EEOC's theory a fact-finder is required to strike down the policy. When Congress exempted hazardous federal occupations from appropriate sections of the ADEA, it did so with the stark recognition that invalidating mandatory retirement provisions for these occupations without proof would be "wholesale error." House Debates, 123 Cong. Rec. 30556 (September 23, 1977) (Remarks of Rep. Spellman); Leg. His. ADEA, p. 415.[4]

In the case of the mandatory retirement provisions at issue, the legislative history of the Fire and Police Employees Retirement System contains sufficient facts *by itself* to warrant a BFOQ. Holding that the Federal government's mandatory retirement policies are reasonable federal standards does not conflict with any requirement that Baltimore's policies have a reasonable basis in fact.

1. The Legislative Facts Supporting Baltimore's Mandatory Retirement Age for Its Firefighters.

Baltimore makes retirement mandatory for its public safety personnel at age 55 with certain exceptions. This legislative policy is found in Baltimore City Code (1983), Article 22 Sections 29 *et seq.*, generally known as the "Fire and Police Employees Retirement System" ("F&PERS"). The F&PERS represents the culmination of Baltimore's century of experience in compensating its employees engaged in hazardous employment.

Between 1880 and the early 1920's Baltimore paid for disability and service retirements of its employees on the

[4] The amendment was offered to avoid the possibility of "wholesale error in dealing with erasing mandatory age requirements . .." House Debates, 123 Cong. Rec. 30556 (September 23, 1977) (Remarks of Rep. Spellman); (Leg. His. ADEA, p. 415.)

basis of annual appropriations to cover yearly payments. Because a system of appropriations for yearly expenses did not provide the security which is essential to retirement benefits based upon either service or disability, Baltimore planned and adopted the first actuarial retirement system in the State of Maryland, and one of the most advanced plans in the Nation (R. 962).[5] Prior to establishing the plan, studies prepared to aid the Mayor and City Council showed that employees engaged in the general business of the city could work safely and efficiently until age 70. In the plan that was passed, the "Employees Retirement System" (ERS), Baltimore City Code (1983), Article 22 Sections 1-16, 42-43, Baltimore guarantees its employees the right to work until age 70, and has done so since the inception of the plan in 1926. The Mayor and City Council of Baltimore relied then, as now, upon the legislative process and the collective wisdom of actuaries, experts, and the affected employees to establish its retirement policies. Baltimore's retirement policies have consistently been far-sighted, well-reasoned and humane.

Despite the intense efforts which preceded the ERS, the intervening years between 1926 and the 1950's revealed evidence which led Baltimore's public safety personnel to believe that the ERS did not fit their special needs (R. 763, 956). Firefighters and police officers showed the Mayor and City Council of Baltimore convincing medical evidence that because of their employment, public safety employees were uniquely susceptible to occupational disease of the heart and lungs. Consequently, firefighters were dying before age 60, which was (and is) the earliest elective age for retirement in the ERS. A special committee of Baltimore's city officials was appointed to report to the legislature regarding the deficiencies in the

[5] The transcript before the District Court is divided into two sequentially numbered volumes, the second of which is designated "Excerpt." Page references are to Volume I, unless designated as R. II.

ERS as it protected public safety personnel (R. 956). As a result of this inquiry, an amendment to the ERS was proposed to accommodate the special needs of Baltimore's public safety personnel and their unions (R. 762). Because of limitations in Baltimore's Charter, the proposed amendment was ruled illegal. Still convinced of the need for enhanced benefits for its firefighters and law enforcement officers, Baltimore sought and obtained special enabling legislation from the State of Maryland. Based upon that authority, Baltimore drafted a bill creating the F&PERS, which bill made transfer into the new system optional (R. 957) for public safety employees in service on July 1, 1962. Baltimore City Code (1983), Article 22 Section 34 (a)(4); (J.A. 3).

Peter J. O'Connor, Chief of the Baltimore City Fire Department, testified before the district court that during the legislative process of the bill, the Baltimore City Firefighters Union lobbied in favor of the bill, which included provisions for mandatory retirement at age 55. In fact, the union provided mortality tables which indicated that on average, firefighters were dying at age 59, which was before the age that a public safety employee would have been eligible for early retirement under the ERS (R. 763). In order to avoid having firefighters die in service, possibly in cases of critical emergency, the F&PERS plan included a mandatory retirement age of 55. The age limit contained in the F&PERS was the result of evidence and statistics provided by Baltimore's firefighters and police officers, the very group which was suffering under the combined effects of occupational disease and an outdated retirement plan (R. 925, 956-7). In short, the mandatory retirement ages in the F&PERS were not arbitrary, but soundly based in fact.

In addition, the General Assembly of Maryland has found as fact that the incidence of heart disease is so great among firefighters that it created a statutory presumption

that "any impairment of the heart or lungs" is causally connected to the firefighter's employment. See, Md. Ann. Code (1956, 1979 Rep. Vol.), Article 101 Section 64A. In order for Baltimore to defeat a workers compensation claim brought by a public safety employee, Baltimore must prove an alternate causation. But since physicians speak of the causation of heart disease only in equivocal terms like "risk factors" and "risk factor analysis," it is impossible to prove any sort of causation — one of the reasons why the General Assembly created the presumption in the first place. Of all the employees in the State of Maryland, only the public safety employees of Baltimore and other political subdivisions are entitled to receive as much as one hundred percent of salary for their disability. *Ibid.*, Section 64A(b). For every other employee in the State, no matter how mangled or battered as the result of an industrial accident, the maximum compensation for total disability is two-thirds of the employee's wages. *Ibid.*, Sections 33(c), 36. For Baltimore's public safety employees, compensation for their disability from heart disease begins at two-thirds of wages, in the form of "Special Disability Retirement," to which is added disability benefits under Maryland's workmen's compensation article. Public safety employees are the only employees in the State of Maryland who are entitled to collect a publicly-funded disability pension in addition to workmen's compensation benefits.

If Baltimore is forbidden to retire its public safety employees before the manifestations of heart disease become ubiquitous in that population, the primary vehicle for compensating older public safety employees will be various combinations of disability payments. In Baltimore's retirement plans, like those of States and municipalities nationwide, disability retirement payments were designed to be the exception; retirement based upon defined and predictable contributions were to be the rule.

Precluding Baltimore from relying upon a reasonable general rule to retire its public safety employees will stand those assumptions, and Baltimore's Fire and Police Employees' Retirement System, on their head. It will seriously undermine confidence in our ability to structure a safe, predictable retirement plan for those who dedicate their lives to working for the Mayor and City Council of Baltimore, and jeopardize the confidence which Baltimore's employees place, along with their contributions, in our retirement systems.

2. *The Legislative Facts Supporting The Parallel Federal Provision.*

It is appalling that EEOC argues that the parallel federal mandatory retirement ages were the result of Congress's own stereotypes about the aging process, i.e., that our Nation's lawmakers were guilty of arbitrary age discrimination in passing the statute which establishes mandatory retirement for the Nation's firefighters. (EEOC Br. 38-39). One need not be the Director of the Federal Bureau of Investigation to unearth the reasons for Congress's actions:

> Testimony during Senate hearings prior to the passage of Public Law 35-350 vividly pointed out the inherent differences between the duties of regular Federal employees and the Federal employees to be covered by the Bill.
>
> * * * * * *
>
> The preferential benefits are not to reward these employees for performing demanding services but are designed to satisfy the Government's need for the type of workforce that can effectively perform these services — young and vigorous.

Letter from Director, Federal Bureau of Investigation, to Assistant Attorney General for Administration, United States Department of Justice (Undated), reprinted in *Report to the House Comm. on Post Office and Civil Service*

by the Comptroller General of the United States: Special Retirement Policy For Federal Law Enforcement and Firefighter Personnel Needs Reevaluation (Feb. 24, 1977) ("GAO Report"). Appendix VI, p. 76, 80.

Congress determined that law enforcement and firefighting are occupations which are not only hazardous, but which require physical ability and stamina, as well as mental alertness. *Senate Hearings Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, Retirement for Certain Hazardous Duty Personnel,* 93rd. Cong., 2nd Sess., p. 28 (Statement of Senatory Percy). The legislation creating the federal BFOQ for firefighters (S. 3263, the equivalent of H.R. 9281) had as its principal co-sponsor Senator Javits, no stranger to the issue of age discrimination in employment and reasonable non-discriminatory practices. *Ibid.,* p. 26. The intent of the legislation was "to help Federal law enforcement and firefighting agencies maintain a relatively young, vibrant, and effective workforce, both for the safety of the individual, and for the society which they serve.[6,7,8]" *Ibid.,* p. 28. Indeed, the legislative evidence of

---

[6] "Two hundred million Americans will receive the benefits [of the provision including mandatory retirement provisions for federal firefighters] because . . . the strength of our society and our cities across the face of this Nation rests on our ability to perform well in the areas of law enforcement and firefighting. Therefore, we are mandated to have young and proficient forces." Senate Hearings Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, Retirement for Certain Hazardous Duty Personnel, 93rd. Cong., 2nd Sess., (Statement of Senator Brasco) p. 136.

[7] "Inevitably the vast majority of federal firefighters or law enforcement officers who are injured on the job are those in the upper age bracket of the service who are beyond their physical prime. *Ibid.,* (Statement of Senator Dole) p. 105.

[8] Employee groups, such as the International Association of Firefighters, strongly supported all aspects of H.R. 9281, including the provision for mandatory retirement. The IAFF authority cited an example that because there were no effective

occupational hazards "dramatically illustrated . . . that Federal law enforcement officers and firefighters cannot be casually lumped together with other Federal employees. By the nature of their work, and the risks they face every day, they are different. And different provisions need to be made for them." *Ibid.*, p. 29. The legislative history showed that Congress wanted mandatory retirement for the Nation's firefighters and law enforcement officers, not simply an enticement for older employees to choose to retire.[9] Quite simply, there was no disharmony between the prohibition of arbitrary age discrimination and the adoption of mandatory retirement for employees engaged in hazardous occupations.[10]

According to the Comptroller General, Congress examined the requirements of federal law enforcement and firefighting, and found that many job characteristics of law enforcement officers and firefighters dictated the need for exceptionally vigorous incumbents. These job characteristics included: 1) working long hours under arduous or environmentally adverse conditions; 2) working under significant physical, mental, and emotional stress; 3)

mandatory retirement provisions, public safety was endangered. In his words, the "63 year old firefighter . . . jeopardizes the lives of every man and every person that they are hired to protect and the people who work with them." *Ibid.*, p. 158.

[9] "These special retirement privileges, enacted as far back as 25 years ago, have been only partially effective in attaining their originally intended purposes [of ensuring a young and vigorous workforce.] Such ineffectiveness might be attributable to . . . the fact that the early retirement option is available only to the employee, with management having no bilateral prerogative to retire, without stigma, one who suffers a loss of proficiency. . . ." *Ibid.*, p. 134.

[10] Senator Bentsen, a sponsor of the legislation to ban age discrimination in federal employment, urged the passage of H.R. 9281 and S. 3263. *Ibid.*, p. 275. He was joined by Senator Eastland (*ibid.*, p. 277), Senator Hruska (*ibid.*, p. 285), Senator Jackson (*ibid.*, p. 288), Senator McClennan (*ibid.*, p. 291), Senator Scott (*ibid.*, p. 294), Senator Talmadge (*ibid.*, p. 297), and Senator Thurmond (*ibid.*, p. 299), among others.

being exposed to hazard during the day-to-day performance of the job; 4) maintaining irregular eating and rest schedules; 5) being absent from home and family for extended periods; 6) being continually on call to respond to emergencies; and 7) having to meet stringent physical demands. In combination, these factors were believed to make it difficult, if not impossible, for older employees to perform at the required pace. GAO Report, p. 23-4.[11]

See also, GAO Report, Appendix III, p. 45.

Congress continued the mandatory retirement provisions with full knowledge that state and local protective service occupations are even more hazardous than the parallel federal positions. Testimony before Congress demonstrated that "state and local firefighters face *thirteen times* more risk than (certain federal firefighters) do." *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers, Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service,* H. Rep., 95th Cong. 2d Sess., 5 October 1978, p. 13.

The parallel federal provisions reflect a Congressional determination that insofar as possible, the ranks of the Nation's law enforcement officers and firefighters should be composed of the young and vigorous. The Assistant Secretary of the Department of Labor recognized the validity of that point, and told Congress:

> To the extent that federal laws provide early mandatory retirement ages, it represents Congressional judgment that after a certain age, the

[11] The GAO Report argues that the coverage of the federal policy is too broad, and many positions for covered employees do not require "extraordinary vigor." *Ibid.*, p. 12. "Over half of our sample of 301 program retirees served in administrative and supervisory positions at the time of retirement." GAO Report, p. 12.

> specific requirement[s] of the job cannot be met by the older worker. Congress can always review these judgments on the basis of new evidence.

Hearings Before the Subcomm. on Labor of the Senate Subcomm. on Human Resources, 95th Cong., 1st Sess., 1977, p. 338.

The General Accounting Office investigated the breadth of federal mandatory retirement, and concluded that especially vigorous employees could be necessary where lapses in performance significantly and immediately inhibit accomplishment of the agency mission and where the duties of the position require: 1) extraordinary physical stamina and continual mental alertness over long periods or 2) frequent short-term extraordinary physical exertion under environmentally adverse conditions. "These criteria could encompass, for example, the duties of an individual frequently required to . . . fight . . . structural fires. In such situations, lapses could result in immediate negative consequences." GAO Report, p. 25.

The Appendix to the report includes the views of the agencies surveyed by the GAO. Not a single Federal agency recommended abolishing the mandatory retirement provisions for its employees. Even the United States Civil Service Commission disagreed with the extent to which the GAO Report was critical of mandatory retirement policies. GAO Report, Appendix II, p. 31. The Department of the Treasury (Appendix III, p. 33), the United States Customs Service (Appendix III, p. 47), the Internal Revenue Service (Appendix III, p. 50), the United States Department of Agriculture (Appendix IV, p. 62), the Postmaster General (Appendix V, p. 70), the United States Department of Justice (Appendix VI, p. 73), the Director of the Federal Bureau of Investigation (Appendix VI, p. 76), the Drug Enforcement Administration (Appendix VI, p. 91) (which thought that the major omissions in the GAO Report suggested a "preconceived conclusion"),

the Immigration and Naturalization Service (Appendix VI, p. 99), all blasted the conclusions of the report. Given that the federal mandatory retirement policies remain unchanged, the GAO must be viewed as the "dissent," and the views of the agencies, the "majority opinion." *Ibid.,* Appendix VI, p. 73, Appendix III, p. 61, Appendix III, p. 41, Appendix VI, p. 87.

It is incorrect to say that the legislative facts adopted by Congress to justify the need for the ADEA in 1967, or the facts before it in formulating the mandatory retirement of federal public safety personnel are in conflict from those found by the Mayor and City Council of Baltimore in 1962.[12] If that were the case here, then local concern might very well yield to the National interest, as that interest has been established by Congress. But such is not the case. Both legislatures determined that, "Generally, a person in his fifties or sixties can not retain the strength and stamina required to perform law enforcement and firefighting activities except in a supervisory capacity." *Ibid.,* Appendix III, p. 43. The legislative facts upon which the F&PERS and the parallel Federal statute were based are a refinement of the general interests protected by Congress. The legislative history supporting the ADEA's broad proscription of age discrimination is the general

[12] According to the DOL Report, subsequent legislative history, specifically as it is found with respect to the BFOQ provision, should be accorded little weight. DOL Study, p. 7, citing *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 354 n.39. (1977). In any event, the legislative history of proposed amendments also contains specific concerns of Congress that the ADEA not a "straight-jacket on endeavors which have a safety involvement" (Senate 1967 Hearings, 103-4), such as firefighting, which has "very strict physical requirements upon which the public safety depends." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. (1977), p. 12. See also, 123 Cong. Rec. 34319 (1977) (remarks of Sen. Javits). There is not a shred of subsequent history which suggests that Congress intended to back down from the protection of legitimate public safety concerns of employers.

rule: the BFOQ, as it is found in the ADEA and as it exists in the F&PERS, reflects the exception to that rule.

a. *Criticism of Federal Practices Is Irrelevant to Baltimore's Retirement Ordinance.*

By suggesting that other federal agencies have criticized the Congressional policy embodied in 5 U.S.C. 8335(b), petitioners attempt to lessen the force of the requirement that federal firefighters retire mandatorily at age 55. But when such criticism is examined, it clearly bears no relation to the facts of this case.

That the Congress may desire, as a matter of policy, to achieve this result through the enhancement of optional retirement for its employees does not diminish the public safety considerations supporting its requirement of youth and vigor for employees in public safety occupations. The overbreadth of Congressional policy does not lessen Baltimore's justification for its own properly defined policies.[13] Furthermore, despite a finding that the general

[13] The EEOC relies heavily on the report entitled *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*. (EEOC Br. p. 41, n.31). This report, prepared for the House Select Comm. on Aging, was based largely upon a literature survey done at the committee's request, and which literature survey appears as Appendix II to the Committee Report. The "Myth" associated with the mandatory retirement of firefighters is that medical science knows enough about the subject to warrant the elimination of mandatory retirement ages. The "Reality" is that medical science does not now know how to avoid the use of mandatory retirement ages in connection with preserving the health of firefighters. The report acknowledges that it is "but a first step in an area that needs much more work. At present only limited empirical data are available." Apx. II, p. 39. As distinguished from law enforcement, firefighting involves "Long periods of relative inactivity [which are] interspersed with sudden bursts of great responsibility which involve handling heavy equipment, sometimes for long periods, often in extreme heat, and sometimes, because of the greater incidence of house fires in wintertime, in extreme cold. The firefighter's rescue activities have the added pressures of urgency." Appendix II. p. 46.

scope of federal special retirement policies was too broad, there were no recommendations that federal firefighters charged with protecting an urban population or industrial area be exempted from mandatory retirement.

In agencies such as the Baltimore City Fire Department, there is precious little room for those who are not fully capable of performing fire combat. The F&PERS is an expensive system to fund per dollar or payroll compensation, and the history of both the fire and police departments in the last two decades has been the "civilization" of both departments. In short, there are a fixed number of uniformed positions for firefighters and officers available to Baltimore, and bringing one "indoors" means that a post will not be manned, a truck will operate with less than a full complement of firefighters, or that the remaining few will pick up the extra weight. None of these alternatives is acceptable to the Mayor and City Council of Baltimore, or its citizens.

b. *That the Parallel Federal Provisions Permits Continued Work Beyond the Statutory Age of Retirement Has No Relevance to this Case.*

The EEOC contends that because agencies, under undefined conditions and for unspecified purposes, may allow employees subject to a statutory mandatory retirement age to work beyond the mandatory retirement age that Baltimore's practices are objectionable, and those of the Federal government are not. Where the mission is strictly law enforcement or firefighting, agencies have established as policy that their need for a youthful and vigorous workforce will not allow resort to this provision. For example:

> The Customs Service, in support of the youthful, vigorous workforce concept, has established the policy that there will be no requests for exception of the mandatory retirement age forwarded to the [Treasury] Department as provided for in the legislation.

GAO Report, Appendix III, p. 48. To the extent that the provision allowing federal employees to work beyond the statutory age of retirement have been examined in court, the evidence shows that the agencies permit no one to work beyond the age of mandatory retirement.[14]

II. Baltimore Proved That Its Mandatory Retirement Practices Were Supported By The Evidence.

A. *The District Court Imposed an Improper, Unreasonable And Erroneous Burden Upon Baltimore.*

The District Court relied upon the test created in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), to strike down the mandatory retirement provisions for Baltimore's firefighters. In the *Tamiami* case, the Fifth Circuit opined that an employer who prima facie violates the ADEA must prove two elements to satisfy the BFOQ defense of Section 4(f)(1) of the Act: first, that the job qualifications which the employer invokes to justify its differentiations are reasonably necessary to the essence of its business, and; second, that either all or substantially all persons above the selected age are unable to meet the employer's standards, or there is no practical way to differentiate qualified from unqualified employees over the age limit. *Ibid.* This "two-prong" test is strictly a creature of the judiciary which eviscerates the BFOQ exception.

In this Court's opinion in *E.E.O.C. v. Wyoming, supra,* the BFOQ exception was stated only in terms of the statutory definition. The Court's opinion never referred to

[14] The provisions requiring mandatory retirement of federal employees are enforced without exception, and the option to continue employees, such as U.S. Marshalls or F.B.I. agents, in employment beyond age 55 is uniformly disregarded. See, e.g., Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), Brief of Defendant-Appellant, p. 36-37 (citing findings of fact made by the district court based upon testimony of retired U.S. Marshalls and F.B.I. agents.)

or adopted the *Tamiami* test. Baltimore asserts that the *Tamiami* test unjustifiably and artifically imposes a more severe burden on an employer than the BFOQ exemption was ever intended to require. Because it has no basis in the contemporary legislative history of the ADEA, the *Tamiami* test must be rejected in favor of a test more in keeping with Congress' prohibition of arbitrary discrimination in employment.

In *Usery v. Tamiami, supra,* the Fifth Circuit explained that each "prong" of the test it had created was derived from sex discrimination cases decided under Title VII. In *Diaz v. Pan American World Airways,* 442 F.2d 385 (5th Cir. 1971), the Fifth Circuit rejected Pan American's policy of refusing to hire male cabin attendants, which policy was based on the theory that males could not cater to the psychological needs of its passengers as well as females could. The Court stated that discrimination based on sex is valid only when the essence of the business would be undermined by not hiring members of one sex. *Diaz, supra,* p. 388.

The second prong of this test was also derived from a sex discrimination case. In *Weeks v. Southern Bell Telephone and Telegraph Company,* 408 F.2d 228 (5th Cir. 1969) the Court held that the employer's refusal to hire women for a job that would occasionally require them to lift objects weighing thirty pounds violated Title VII. *Weeks, supra,* at p. 235, 236. The Court stated that to rely on the Title VII bona fide occupation qualification exception, an employer must prove it has a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently. *Weeks, supra,* p. 235. That standard comprises only half of the second prong of the *Tamiami* test. The other half, "that there is no practical way to differentiate qualified from unqualified applicants," was derived from a footnote in the *Weeks* case. *Weeks, supra,* p. 255, n.5.

These standards are doubtless appropriate in a sex discrimination case where the ability to perform simple tasks is readily determined, and where failure to perform the job has no public safety implications. But there are important reasons why extending these standards to define the BFOQ exemption of the ADEA is unwarranted, unworkable and unjustified.

First, classifications based on sex have enjoyed considerably more constitutional protection than have age classifications. Falling just short of a "suspect" class, women have been characterized by this Court as having suffered a ". . . long and unfortunate history of sex discrimination," and still facing ". . . pervasive . . . discrimination in our educational institutions, in the job market, and . . . in the political arena." *Frontiero v. Richardson,* 411 U.S. 677 (1973). In sharp contrast, the aged, and specifically the class composed of highway patrolman over 50, has been clearly denied "suspect" status by this Court, which stated:

> [A] suspect class is "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons . . . have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a "discrete and insular" group [citation omitted], in need of "extraordinary protection from the majoritarian process." Instead, it marks a stage that each of us will reach if we live out our normal span.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313, 314 (1976).

In the *Tamiami* case, the Fifth Circuit applied an oppressively strict standard, taken wholecloth from the highly protected realm of sex discrimination, to a class which patently warranted a lower level of constitutional protection. There is no contemporaneous[17] legislative history which warrants such an elevation of the scrutiny to which an employer's decisions are to be examined under the BFOQ test. Application of a standard derived from race or sex discrimination to age discrimination is as "easy and wrong" today as when the Secretary of Labor first wrote those words. See, *supra,* p. 7.

In the *Murgia* case, this Court upheld a statutory mandatory retirement age of 50 for the Massachusetts State Police. The statute had been challenged on the basis that it denied equal protection under the Fourteenth Amendment. This Court examined the Massachusetts mandatory retirement provision by applying a rational basis standard to the State's legislative determination. The opinion cited the testimony of the State's medical experts, who testified to the physiological and psychological demands of police functions, the relationship between aging and the capacity to handle stress the risk of physical failure — especially cardiovascular — that increases with age and the inability to perform stress functions that increases with age. *Ibid.*, at p. 311.

Similarly, in *Vance v. Bradley,* 440 U.S. 93 (1979), this Court upheld the mandatory retirement for foreign service personnel at age 60 against a challenge brought under the Equal Protection Clause of the Fifth Amendment. Again, this Court applied a rational basis standard to the employer's practices, and found that the retirement age was rationally related to furthering a legitimate state interest, in that it assured the competence and reliability of foreign servants in critical positions, created predictable promotion opportunities, and removed older employees less equipped to face the rigors of overseas duty. *Id.*, at 97.

The application of the *Tamiami* test to the ADEA's BFOQ exception has the effect of amending the statutory defense given to employers. The application of the BFOQ exemption here and in the District Court's opinion in *E.E.O.C. v. Missouri Highway Patrol,* 555 F. Supp. 97 (W.D. Mo. 1982), *rev'd,* 748 F.2d 447 (8th Cir. 1984) case demonstrates that an employer will prevail only if its practices pass what is tantamount to a strict scrutiny test. The various courts considering the BFOQ exemption including the District Court in the present case interpret the BFOQ exemption in a way that improperly vaults age into the highest degree of constitutional protection.

In the Chief Justice's dissent in the *Wyoming* case the decision of the District Court in this case was cited as a warning that rigid application of the strict scrutiny test found in *Tamiami* will cause extreme hardship to all political subdivisions. Given the state of modern medicine, it is particularly difficult for the employer to meet the second prong of the *Tamiami* test. Medical experts can always be found who are willing to argue that tests exist to determine which employees are able to perform a job and which cannot, irrespective of age. There are persons engaged in administering various physiological and medical tests for profit, such as petitioners' witness (Paul Davis, Ph.D.) (R. 32). It should come as no surprise that those who have an unabashed financial interest in selling their services make extraordinary claims for the ability of their tests. It is also not surprising that little hard evidence, i.e., articles accepted for publication by well-respected, refereed journals, is cited by these advocates. The practical effect of this 'second prong' is that it virtually ensures an employer's defeat in these cases if a plaintiff can find anyone at all to say that not all persons above the mandatory retirement age cannot perform the job or that there exist tests capable of differentiating between qualified and unqualified employees without regard to age.

Finally, the *Tamiami* test finds no support in the legislative history of the ADEA. As set forth above, the studies and congressional debate which preceded passage of the Act in 1967 clearly and unequivocally demonstrates Congress' desire to protect the legitimate and rationally based judgment made by employers. There is not one iota of legislative history which supports an inference that Congress intended to elevate age-based distinctions into the strict-scrutiny arena.

B. Baltimore Demonstrated that Its Mandatory Retirement of Firefighters was Predicated Upon a Bona Fide Occupational Qualification Reasonably Necessary to The Normal Operation of the Baltimore City Fire Department.

Assuming that this Court is satisfied that the legitimate interests of employers are adequately protected by the *Tamiami* test, Baltimore urges this Court to examine closely the process by which that test is applied generally by courts, and specifically as it was appplied in this case.

Baltimore sought review of the District Court's opinion with *E.E.O.C. v. Wyoming, supra,* in order to advance the argument that the prevailing judicial analysis of the BFOQ defense was woefully deficient, both in terms of protecting its sphere of sovereignty and as a matter of basic statutory construction. To a certain extent, judicial analysis has matured after this Court's opinion in *Wyoming,* even though no specific guidelines were provided regarding the application of the BFOQ defense, but the test does not protect the legitimate concerns of the Nation's State and local governments. We repeat what has been the essence of our case from the very beginning: *If firefighting in Baltimore's metropolitan area does not warrant a reasonable BFOQ under the ADEA, then the BFOQ exception does not exist.*

One error made by the District Court below, as well as the District Court in the case of *E.E.O.C. v. Missouri, supra,* is the failure to afford the political subdivision even the meager protection of the first element of the *Tamiami* test. That element, a determination whether the subject practice is reasonably necessary to the essence of the employer's business, is largely discarded in the analysis of BFOQ's for firefighting and law enforcement. It is tautological that the essence of the Baltimore City Fire Department is fighting fires. Because there is no "business" per se, courts gloss over the element of the *Tamiami* test derived from the *Diaz* case. This is no minor transgression, because:

> It is the Diaz element of the BFOQ defense where the third-party safety factor comes into play. *Diaz* mandates that the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business. . . . The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications. . . .

Usery v. Tamiami Trail Tours, supra, pp. 235-6.

The *Tamiami* court intended that the "reasonably necessary limitation" upon age distinctions would permit courts to weigh the effect upon public safety of removing a legitimate age classification. Even under the strict *Tamiami* test, the first element requires consideration of the potential for harm in abrogating safety standards for protective service personnel. Age differentiations which would be "unreasonable" if applied where disruption of an employee's performance entailed little risk of harm might be the very essence of good judgment where such disruption would be catastrophic.

The factual findings made by the District Court establish that firefighters are at higher risk for heart

disease — already established as the Nation's number one killer — than the average population. "Plaintiffs' expert witnesses . . . readily concede that firefighters *as a class are particularly subject to heart disease* and that *the risk of heart disease increases with age.*" 515 F. Supp., p. 1298. A court should have no business undermining legitimate, factual, concerns for public safety because it believes there may be a better way.

When Congress amended the portion of the ADEA which applies to the Federal government, it expressed the intent to make the Federal Government "take the lead in eliminating mandatory retirement from the Federal service." 123 Cong. Rec. 29010 (September 13, 1977); Leg. His. ADEA, p. 407. Congress set the Federal service up as a benchmark, against which the Courts could measure the conduct of other employers. Indeed, Congress placed significantly greater burdens upon the Federal service than were placed upon employers in general. Those substantive differences listed by the EEOC (EEOC Br. 33), such as the grant of a *bona fide* executive exemption to employers other than the Federal service, and the age limit of 70 for protection under the ADEA for employees other than those in the Federal service, are in complete harmony with Congress' attempt to make itself the model employer for the Nation.

Congress did not express the intention, nor does it have the authority, to impose strict or middle tier scrutiny upon the retirement practices of other employers, while reserving the right unto itself to act practically without restraint. *McGowan v. Maryland,* 366 U.S. 420 (1961) (Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.) There is nothing unconstitutional about tailoring local statutes to meet local needs, *United States v. Sharpnack,* 355 U.S. 286, 294 (1958). But when Congress enacts National legislation, the situation is fundamentally different. "If one small group is excluded from the operational effect of

the statute, the rationality of that exclusion is highly suspect." *D.C. Federation of Civic Associations, Inc. v. Volpe,* 434 F.2d 436, 439 (U.S. App. D.C. 1970), cited in *United States v. Thompson,* 452 F.2d 133 (U.S. App. D.C. 1971). The argument that federal employment is judged by a rational basis test, while non-Federal employment is judged by a middle tier or strict scrutiny test is a discrimination against people. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency v. New York,* 336 U.S. 196 (1949) (Jackson, J., concurring) cited in *Eisenstadt v. Baird,* 405 U.S. 438, 454 (1972). The assertion that the ADEA imposes a heightened level of scrutiny only for non-Federal employment leads ineluctably to the irrationality of the Act itself. On the other hand, the argument that the ADEA was Congress' means of extending traditional equal protection to private contracts of employment by reliance upon its Commerce Clause power, harmonizes the ADEA with this Court's holdings in the area of age discrimination, the "right" to employment, Federal retirement practices, and those of Baltimore as well.

1. *All or substantially all Firefighters Over the Mandatory Retirement Age Cannot Safely And Efficiently Function as Firefighters.*

Firefighting is the most difficult, dangerous and deadly job in the Nation. According to petitioners, firefighting has more on-duty deaths per capita than any other occupation in the Nation. (R. 330)[1] (Def. Ex. 15, p. 10; R. 322; R. 322). The leading cause of death and disability among firefighters is heart disease (R. 338), the incidence of which increases dramatically with age (R. 394). The most common cause of death in the age group 50-55 is

heart attack (R. 912), and firefighters, as an occupational group, suffer from heart disease at twice the National rate (R. 489). Sudden heart attack causes 44.4% of the on-duty deaths in firefighting (R. 695).

The firefighter's working environment is characterized by a lack of oxygen (R. 388), and extreme ranges of temperature (up to 450 degrees F. (Def. Ex. 15, p. 14; R. 322; R. 322)) and humidity (R. 377-94). These factors tax the heart's ability to function, perhaps by as much as 50% (R. 387). The fire scene always exposes a firefighter to carbon monoxide, a potentially lethal poison which kills by robbing the body of the ability to get oxygen to the heart. Only very strict use of respirators eliminates this danger, because a firefighter is most likely to take off his respirator when the danger from carbon monoxide is greatest (R. 383). Added to the physical stressors is the requirement that firefighters be prepared to save the lives of fire victims.

Petitioners' expert described firefighting as follows: "In setting up to fight the fire, firemen, protectively clothed in boots, heavy coat and helmet, hook up to hydrants, raise ladders and stretch hoselines up fire escapes, interior stairs of the building and up aerial ladders. On occasion, scaling ladders, which consist of a metal and wood beam with a hook at the top and crossbars for climbing, are used to allow individual firemen to go up the outside of a building, floor by floor. In fighting the fire, firemen advance charged hoselines. They use axes for forcible entries, axes or power saws to cut holes in roofs or in floors above the fire for ventilation, and halligan tools and hooks to pull down ceilings and pull up floor boards to locate pockets of fire." (R. 331-3); (Def. Ex. 15, p. 1-2; R. 322; R. 322).

"Speed, with safety, is important where there is the potential of people in danger. Lifesaving is sometimes accomplished from aerial, portable or scaling ladders and

becomes more difficult under extreme conditions such as rain, ice and wind. In some instances, firemen are lowered in a rope harness to rescue people at windows, then pulled back up by other firemen. During fire and rescue operations, firemen often work in adverse conditions of heat, limited or, in some cases, near zero visibility because of smoke and other circumstances and sometimes, in the presence of noxious fumes. If environmental conditions are severe, firemen Don Scott Air Paks which weight about 30 pounds and use compressed air. With this additional weight, firemen still perform their assigned duties. Endurance or stamina, the ability to perform work over time, becomes especially important when working at a fire scene which often makes breathing difficult, and saps a firemen's energy." (R. 333-4).

According to petitioners' witness: "Age limits performance, intimating that the older firefighters are working at a higher percentage of their functional work capacity." (Def. Ex. 15, Abstract, p. 2; R. 322; R. 322). "The successful completion of firefighting tasks requires a physical performance profile reflecting *youth,* high aerobic capacity, high muscular strength and endurance, above average lean body weight and minimal body fat." (Def. Ex. 15, Abstract, p. 3, emphasis added; R. 322; R. 322).

According to petitioners' expert's study, the fitness of firefighters is that of the average male. Some of the firefighters in the study, who were all active duty firefighters with the *Federal* government, showed evidence of Coronary Artery Disease (Def. Ex. 15, p. 10, emphasis added; R. 322; R. 322). Petitioners' expert's review of the literature revealed: "Cardiovascular responses to sudden strenuous exercise without warm-up were studied in 44 males ages 21 to 52. Thirty-one (70%) of these men had abnormal EKG changes, including ischemic, T wave, and ectopic beat changes. In another study, . . . increases in heart rate after the sounding of the alarm were 47 beats/minute (BPM) mean value, with ranges of 12 to 117

BPM. Approximately one minute after the alarm, rates were still elevated an average of 30 BPM. *Performing the same activities in a simulated condition failed to produce the same results.*" (Def. Ex. 15, pp. 11-12; emphasis added; R. 322; R. 322). "Data gathered during live firefighting produced even more startling results. Two subjects, 3.5 minutes after the sounding of the alarm and arriving on the scene, had heart rates of 150 BPM. For over 90 minutes of consecutive firefighting, the heart rate of one firefighter was maintained at 160 BPM or greater. *There does not seem to be a discernible difference in the heart rate response pattern between experienced versus inexperienced firemen.* Heart rates would rise even when knowing that the probability of a false alarm was great." (Def. Ex. 15, p. 12; emphasis added; R. 322; R. 322).

The City of Baltimore has a population of 785,000 and consists of an area of 91.93 square miles, of which 78.82 square miles are land. Baltimore has a waterfront of 46 miles of which 39 miles are developed. Fire prevention and suppression are provided by fifty-two engine companies (including fireboats), twenty-nine truck companies, one heavy duty rescue wagon, sixteen medical units, and numerous special vehicles. The department is staffed by 2,195 personnel (R. 824). Between July 1, 1980 and June 30, 1981, the department responded to a total of 120,225 emergency alarms. Within the City's borders are 5,000 vacant buildings, 14 hospitals, 40 nursing homes, 14 domiciliary homes, 10 underground parking lots, 1,507 high-rise buildings, 301 schools, 6 subway stations, 2 correctional institutions and 31 bulk oil facilities, "running the gamut of fire hazards." (R. 861-863). According to the Chief of the Baltimore City Fire Department "the rigors of firefighting in Baltimore are as great as probably any city in the country." (R. 862).

The District Court was presented with evidence from all sides that the capacity for physical work declines linearly and inexorably with age (R. 371, 592, 907). The ability to

perform physical labor is the sum of aerobic capacity, or the body's oxygen-using ability, and anerobic capacity, which uses the body's stored chemical energy. Since resort to anerobic capacity is very inefficient and creates an oxygen debt which the body must repay, the anerobic component of an individual's work ability is discarded.

Aerobic capacity is measured both in terms of the total amount of oxygen transported to muscle tissue per minute, and in terms related to body weight (R. 355). The first measurement, absolute aerobic capacity, is expressed as liters of oxygen used by the body per minute (1/min). The more oxygen which is transferred to muscle tissue by efficient operation of the heart and lungs, the more work can be done. Absolute aerobic capacity is essentially a measure of how much work the body can perform, akin to a measurement of how far a car can go before refueling. The second measurement, relative or weight-based aerobic capacity, is also important to firefighting. Weight-based aerobic capacity is measured in milligrams of oxygen per kilogram of body weight, per minute (ml/kg-min). Weight-based aerobic capacity is essentially a measurement of how efficiently an organism uses oxygen, similar to a car's miles-per-gallon rating.

The differences between what these measurements represent is important. A very small individual might not be able to muster the absolute aerobic capacity required to perform arduous labor, no matter how well-conditioned he or she was, i.e. no matter how high was his or her weight-based aerobic capacity (R. 612-16). Evidence proved that firefighters often work at or near their maximum capacity (R. 591.)

The EEOC's witness, who had no special knowledge of the requirements of firefighting (R. 621), testified that it would be reasonable for an employer to set a minimum requirement of 3.0 1/min absolute aerobic capacity for firefighters, although personally he preferred 2.5 1/min.

(R. 623). The figure of 2.5 1/min is a dangerously low standard, since according to another of plaintiff's witnesses, a group of firefighters whose fitness was measured and determined to unacceptably low had a calculated mean absolute aerobic capacity of 3.27 1/min.[15]

The plaintiffs' evidence proved that merely wearing the 52 pounds of protective gear required for fire combat consumed nearly one-third of a firefighter's strength (R. 286), and raised his heart rate 27% (R. 340). A firefighter often works at 60%-80% of his maximum aerobic capacity while in fire combat (R. 591), and the requirement for immediate response and inherently dangerous working conditions makes fire combat one of the most perilous occupations in the Nation.

All experts expressing opinions testified that firefighters are, on average, no better conditioned than the average sedentary population. That is, conclusions from longitudinal studies of the fitness of the average population can be legitimately applied to firefighters of similar age (R. II 28).

---

[15] Plaintiff's witness Davis measured the aerobic capacity of a group of firefighters, and then rated individual performance. There was, according to the plaintiff's own evidence, a perfect inverse correlation of work ability with age. Thus, the mean age of the "Excellent" group was 28, the "Good" group was 29.3, the "Average" group 31.4, the "Fair" group 37.9, and the "Poor" group, 46.1 years of age (R. 356). Regarding even the "Fair" group, plaintiffs' expert conceded that he would "certainly not look to those individuals with the same degree of security that I would with the individuals in the [excellent] group." (T. 358).

If the "Poor" group alone is analyzed, members are found to exhibit an absolute aerobic capacity of 3.2 1/min, making a minimum of 2.5 1/min very low indeed. The group possesses a mean weight-based aerobic capacity of 34.9 ml/kg-min, and an average body weight of 206.1 lbs, or 93.7 kg. Multiplying 93.7 kg (mean body weight) times 34.9 ml/kg-min (relative aerobic capacity) yields 3,270 ml/min absolute aerobic capacity. Expressed in standard units, this equals 3.27 1/min aerobic capacity (R. 616-618).

In point of fact, there are very few firefighters over the age of fifty-five across the Nation. Despite Dr. Davis' extensive testing experience, he had never tested a single firefighter over the age of 65, the age to which the District Court permitted the plaintiffs to work! (R. 309). In the Washington metropolitan area departments, of a total 3,050 firefighters, there were only 11 (0.36%) firefighters between the ages of 55 and 69, and only 1 (0.03%) above the age of 60 (R. 352). According to the plaintiffs' evidence, this age distribution was not unusual (R. 326). Montgomery County, Maryland, a locale which Davis consults, had only 1 employee in the fire service over age 55, and he was a fire officer (R. 369). In the Davis study, there was only 1 individual — from a group of more than 100 active firefighters — over the age of 55 who was subjected to any physiological study (R. 327), and none over the age of 60! (R. 328).

Dr. Lind provided testimony that at age 60, an individual's maximum aerobic capacity (variously VO_{2max}, MVO_2, or VO_2Max) is reduced 30% from its peak value, which is usually achieved at about age 20 (R. II 25). According to *The Human Energy Costs of Firefighting*, as actually measured by researchers, at age 60 a male firefighter would be called upon to exceed his aerobic capacity very quickly (R. 376-9). At the levels of exertion actually required by firefighting, younger men could work for an hour or more, while those above age 60 could only last for a few minutes (R. II 39-40).

Evidence provided by the petitioners proved that all or substantially all firefighters over the age of 55 could not meet a reasonable standard. Petitioners' witness, Dr. Buskirk, provided evidence derived from his measurements of the aerobic capacity of the members of a volunteer firefighting company (R. 625-30). Petitioners' data show a level of performance for the firefighters well below values derived from measurements of the average sedentary population. According to petitioners' own measurements, firefighters weighing 80 kg would fail to exhibit a reasonable maximum aerobic capacity at an age slightly greater than 35.[16]

According to respondents' evidence, if the measurements made by Buskirk and published in the professional literature are analyzed in relation to age (R. II 24), no one above the age of 50 will be able to achieve a maximum aerobic capacity of 3.0 1/min (R. II 36); (Def. Ex. 8h; R. II 36; R. II 36), a level admitted by the petitioners' witness Buskirk to be a "reasonable standard." Even the well-conditioned 55 year old will not reach that reasonable minimum standard, and if that individual is a firefighter, his performance will be unsafe. It will only be a "very, very rare" individual between 50 and 55 who will demonstrate a weight-based aerobic capacity of 40 ml/kg-min., a reasonable standard (R. 925-6).

In practical terms, even petitioners' witnesses concede that firefighters rarely work in fire combat beyond the age of 55. When they do so and survive, it may very well be because their younger counterparts "look out" for the older firefighters, as they do in Baltimore, or they gravitate to less physically demanding positions (R. 795-6). In technical terms, the application of a reasonable standard of aerobic capacity would eliminate all or practically all persons over the age of 55 from fire combat.

---

[16] If 3.0 1/min is, as Dr. Buskirk admits, a reasonable job requirement, then 80 kg (176 lbs.) firefighters must possess a weight-based aerobic capacity of 37.5 ml/kg-min to satisfy that reasonable standard. 37.5 ml/kg-min times 80 kg yields an absolute aerobic capacity of 3,000 ml/min or 3.0 1/min. The point at which the Alpha volunteer firefighters exhibit a weight-based aerobic capacity is just beyond age 35! Even taking into account the error flags on Buskirk's graph, not a single subject beyond the age of 55 tested by this petitioners' expert was able to achieve the 37.5 ml/kg-min weight-based aerobic capacity required to produce 3.0 liters of absolute oxygen transport A. 3 (Def. Ex. 17-A; R. 623; R. 637).

2. It is Impractical or Impossible to Test for Cardiovascular Health for Public Safety Employees.

Petitioners' evidence established that heart disease was the number one killer in the Nation. For the form of heart disease known as atherosclerotic cardiovascular disease (ASCVD), the first symptom in one-half of the cases is sudden death or myocardial infarction (R. 913). Firefighters have at least double the average population's rate for sudden cardiac death, myocardial infarction and angina pectoris (R. 489). Petitioners' evidence incorporated to the International Firefighters *Mortality Report* (1976), which establishes heart disease as to be the leading cause of death and disability for firefighters. (R. 337-8); (Def. Ex. 15, pp. 10-14; R. 322; R. 323).

Petitioners' witness admitted that 50% coronary artery occlusions are frequently found in males aged 55, and that a 50% coronary occlusion could not be ruled out by a negative exercise stress test (R. 531). A firefighter with a 50% occlusion would cause that witness concern, because the firefighter would have gone beyond the threshold of compromise to the circulatory system, unless he "shepherded" his energy. But to place this firefighter suddenly in an emergency situation is a "major hazard — [a] challenge to the organism's capabilities." (R. 537). In other words, a firefighter so situated might die.

The extent to which cardiac health can be measured is one of the great medical controversies of our day.[17] The

[17] The type of testing advocated by Dr. Fox, and adopted by the District Court, follows an experiment conducted by Dr. Robert A. Bruce entitled *Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Disease Events in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study,* and published in the American Journal of Cardiology, at Vol. 46, p. 371 (Sept. 1980). Data presented to the District Court were derived substantially from that research. (A. 2), (Pl. Ex. 24(i); R. 440; R. 603); (A. 1), (Pl. Ex. 24(e); R. 440; R. 603). Bruce's article clearly demonstrates the enormous increase in primary cardiac events after age 55, and indeed, the top part of

literature on the practical worth of cardiovascular testing has varied greatly in the past two decades. In the early days of electrocardiography, wild claims were made for the predicative and diagnostic value of the resting EKG and the simple Masters Step Test. Recent studies indicate that

the graph shows that age less than 55, as opposed to age 55 and greater, is a statistically significant predictor of primary cardiac events to the 0.05 level of probability, considered significant by scientific researchers (A. 1); (R. 919). If Baltimore applied Bruce's experiment (n= 2365) to its firefighters (n= 2195), it would conduct as many as 2,195 Exercise Stress Tests to retire about 1.1% of the population of firefighters determined by this experiment to be significantly at risk. (R. 921). According to Bruce's data, 2,365 persons are likely to experience about 8 primary cardiac events which would be eliminated by the experiment (2,365 (the number of subjects) times 1.1% (the percentage of tested subjects who would be in Group 3, the unhealthy or high risk group)) times .33 (the rate at which the unhealthy or high risk group experiences primary cardiac events over a five year period) = 8). However, the vast bulk of subjects, or firefighters, would continue to experience primary cardiac events at least at the rate demonstrated in A. 1. The healthy group cleared by the experiment consists of 1) those who had no traditional risk factors, and for whom Exercise Stress Testing was of no predictive value, amounting to 41% of the population, and 2) those who had any risk factor, such as smoking, high blood pressure, family history of heart disease, glucose intolerance, or elevated levels of cholesterol, but two or fewer Exercise Risk Predictors showing up on the stress test, amounting to 58% of the population. Over the 5 years of the study, Group 1 had 10 primary cardiac events (0.01 (the five year probability) times 980 (the number in the group), while Group 2 had 20 (0.015 (the five year probability) times 1,367 (the number in the group)). These groups would be retained in the fire service by the experiment. Group 3, the group retired as unhealthy, had 8 primary events (0.33 (the five year probability) times 25 (the number in the group). Thus the healthy groups cleared for work by this experiment had nearly four times the number of primary cardiac events (30) as the unhealthy group (8), plus, 17 of those 25 firefighters retired under this experiment might have been healthy enough to continue working. In sum, this experiment, which has been done only once, purports to tell us a great deal about a miniscule segment of the general population. Requiring Baltimore to make medical judgments upon this experimental paradigm is like requiring

these claims were false: The origins of atheroclerotic cardiovasular disease remain obscure. Experts do not know what causes the disease, but they think they know what is found in association with it. The most important thing associated with ASCVD is advanced age: Of attributes which have been measured, the only statistically significant predictor of coronary health meas ured is age less than 55 versus age 55 or older (R. 919, 927).

As an example of just how controversial the assessment of cardiac health is, the Report of the Council of Scientific Affairs of the American Medical Association issued a report which stated:

> "[R]ecently, however, have data become available which allow comparison of coronary arteriography with the results of exercise testing in substantial numbers of asymptomatic subjects. This has shown a disturbingly high prevalence of both false positive and false negative tests so that the value of such testing has recently been challenged.
>
> * * * * * *
>
> [Exercise Stress Testing] probably has little indication in the routine screening of the healthy

firefighters to drive their emergency vehicles by looking through a microscope. Considering that responsible medical opinion is split on the value of maximal Exercise Stress Testing, it is an outrage to require Baltimore to validate a scientific study using the lives of its firefighters.

When Dr. Bruce advocated performing this experiment on Wyoming Game Wardens before the jury in *E.E.O.C. v. Wyoming,* No. C 80-0336 (D. Wyo. Nov. 18, 1983), on remand from this Court, his testimony was rejected, and that of Drs. Lind and Antlitz, who also testified for the respondents below, was credited. When Dr. Fox testified before the District Court in *E.E.O.C. v. Commonwealth of Pennsylvania,* 596 F. Supp. 1333, appeal docketed, No. 84-5743 (3rd Cir. Nov. 6, 1984), the Court rejected his testimony that age was not a BFOQ for Pennsylvania State Police Officers. When Drs. Lind and Antlitz testified in Massachusetts concerning age as a BFOQ for law enforcement personnel, their position was adopted by the First Circuit, *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984), *cert. denied,* ___ U.S. ___, 53 U.S.L.W. 403 (1984).

> population as a case finding device, but it may provide a useful indication of coronary disease prevalence in epidemiological studies of middle-aged men.

Ibid., p. 10.

The testing process itself poses a significant threat to firefighters. For testing to have any relevance at all, it must approximate the conditions to which a firefighter is exposed. Thus a strenuous occupation requires a strenuous test. One of the subdivisions to which plaintiffs' witness pointed as an example of a fire department which tested its employees was Alexandria, Virginia. After the district court trial in this case, Alexandria was compelled to cease testing firefighters after the tragic death of 39 year old firefighter just a few minutes after completing the test. The Barnard study, revealed that of 90 firefighters tested, one died of a myocardial infarction two days after having a normal resting ECG. Another firefighter, age 47, had a normal ECG during the stress test, and then suffered a myocardial infarction while showering 20 minutes after exercise. Barnard, et al., *Near-Maximal ECG Stress Testing and Coronary Artery Disease Risk Factor Analysis in Los Angeles City Firefighters,* J. Occ. Med., Vol. 17, No. 11, p. 693 at p. 694 (R. 921).

In most occupations, testing may adequately predict the ability of a given individual to perform a job. In the case of firefighting, the only reasonable test is the job itself (R. 932, 934). The rigors of moving a 117 pound duffle bag filled with Sakrete on a pleasant summer day (R. 391-3) do not weigh in extreme heat and humidity, or extreme cold, all significant stressors to a firefighter. Nor does such a test take into account the psychological stresses which exist in the fire ground when that 117 pound "object" is a mother who is screaming for the "subject" to rescue her infants from a blazing building two floors above. Furthermore, the test does not cope with errors in judgment which a firefighter might make, such as attempting a rescue or

"overhauling" without the use of protective air masks. Even with the strictest of discipline, firefighters are liable to get a "belly-full of smoke." If this is not laboratory air, but combustion products, including deadly carbon monoxide, the result will be more profound than a failing grade.

CONCLUSION

Baltimore urges this Court to find that the comparable Federal statute requiring retirement for Federal firefighters is a reasonable standard against which to measure Baltimore's retirement practices.

If this Court determines that the only standard is the BFOQ itself, Baltimore urges that this Court adopt the construction in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) and *Murnane v. American Air Lines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), wherein the employer must show only a minimal increase in the risk of harm for occupations upon which the public safety depends.

Even the *Tamiami* test, read in the context of the case, requires only that an employer's actions have a reasonable basis in fact. Any test which ignores the reasonableness of an employer's actions has no basis in the legislative history of the BFOQ, nor is it warranted by the nature of age discrimination.

For the foregoing reasons, the Circuit Court should be affirmed.

Respectfully submitted,

BENJAMIN L. BROWN,
City Solicitor,
*AMBROSE T. HARTMAN,
Deputy City Solicitor,
L. WILLIAM GAWLIK,
Assistant City Solicitor,
City Hall,
Baltimore, Maryland 21202,
(301) 396-3298,
Attorneys for Mayor and
City Council of
Baltimore, Respondents.

April, 1985

* *Counsel of Record*

INDEX TO APPENDIX

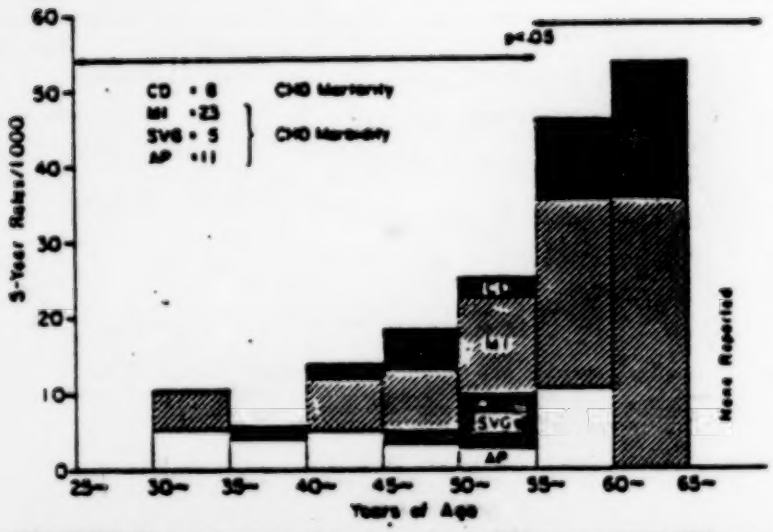
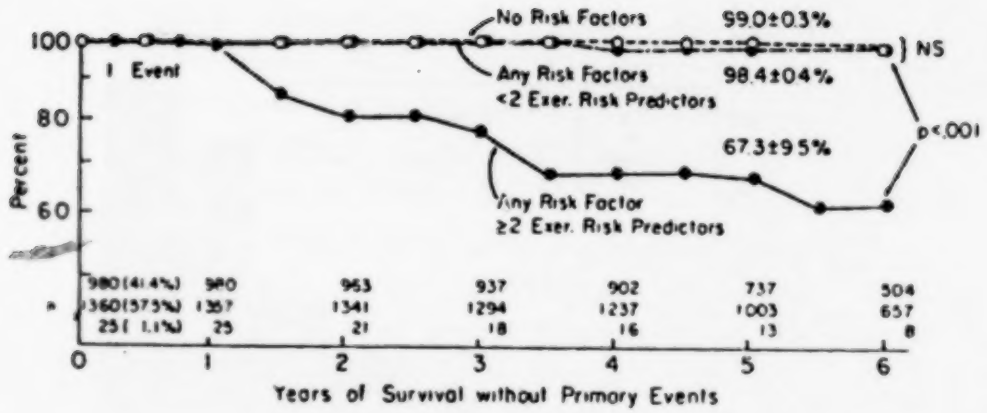


FIGURE 2. Five year rates of coronary heart disease events/1,000 men according to age at initial examination. There were no events in the small groups of persons 25 to 29 years of age and 65 to 69 years of age. AP = angina pectoris; CD = cardiac death; CHD = coronary heart disease; MI = myocardial infarction; p = probability; SVG = saphenous vein bypass grafting procedure.

A. 2



A. 3